

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2065

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2065

NAPIER TALTON,

PETITIONER-APPELLANT,

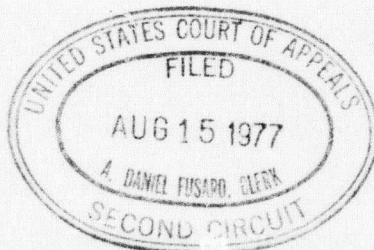
- VS -

CARL ROBINSON, WARDEI,
CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS,

RESPONDENT-APPELLEE.

On Appeal From The United States District Court
For The District of Connecticut

JOINT APPENDIX



JOHN R. WILLIAMS
265 CHURCH STREET
NEW HAVEN, CONNECTICUT 06510
203-562-9931

ATTORNEY FOR APPELLANT

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PB

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ST/OFFICE	DOCKET NR.	DOCKET NUMBER	FILING DATE MO. DAY YEAR			J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	INDEX
205/2	76	401	10	15	76	3	530	1				MJB 0505		76 401

PLAINTIFFS

TALTON, Napier

DEFENDANTS

ROBINSON, Carl, Warden
CCI Somers

CAUSE

Petition for a writ of habeas corpus brought by a state inmate.

ag

ATTORNEYS

John R. Williams Ct. Appt.
265 Church St.
New Haven, Conn.

Ernest Diette
235 Church St
New Haven, Ct

BEST COPY AVAILABLE

FILING FEES PAID

STATISTICAL CARDS

KX CHECK

1976	NR.	PROCEEDINGS
10-15	1.	Petition for a writ of habeas corpus filed, Motion to proceed in forma pauperis granted. Blumenfeld, J m 10-19-76
	2.	ORDER, Blumenfeld, J. m 10-19-76 Appt John R. Williams to represent the petitioner. Copy of petition and motion and order mailed to Atty Williams.
11-29	3	Amended Petition for Writ of Habeas Corpus filed.
"	4	ORDER TO SHOW CAUSE, Blumenfeld J. m 11-30-76. Attested copies of OSC & Mo. to proceed in forma pauperis handed to Marshal for service on Mr. Robinson and Atty O'Neill.
12-7	5	Respondents Return to the Amended Petition for Writ of Habeas Corpus
12/7	6	Marshals return of service filed.
12/15	7	Amendment to Court Appointed Counsels Amendment
1977		
2-1	8	Application for Writ of Habeas Corpus ad Testificandum and affidavit "Application granted." Blumenfeld J. m 2-1-77. Copies to counsel.
2-4	9	Writ of Habeas Corpus Ad Testificandum. Blumenfeld, J. m 2-4-77. Copies mailed.
1-31		Evidentiary Hearing - Over to 2-7-77 at 10:00 a.m. (Blumenfeld, J.)
2-7		Two attested copies of application for writ and Order handed to Marshal for service
2-17		EVIDENTIARY HEARING ON THE MERITS Pet. exhibits 1 & 2 filed. Petitioner testified after being given affirmation. Dec. res.
2-25	10	Respondents Brief in Opposition to the Petitioners Request for a writ of habeas corpus.
3	11	Brief in Support of Petition For Writ of Habeas Corpus.
3-2	12	Return of Writ of Habeas Corpus Ad Testificandum by U.S. Marshal.
3-22		Court Reporter's notes of proceedings held on Feb. 17, 1977, filed in Hfd. (Collard, R.)
5-24	13	Memorandum of Decision, Blumenfeld J m 52/4/77 Copies mailed. (writ of H.C. is denied)
5-25	14	JUDGMENT entered, Markowski, C. m 5/26/77. Copies mailed.
6-9	15	Motion for Leave to Appeal in Forma Pauperis. filed by pltf.
6-14		END. "Leave to appeal in forma pauperis is granted." MJB m 6/15/77. Copies to counsel.
"	16	Notice of Appeal filed. Copies to counsel. Attested copies of notice and docket entries mailed to Court of Appeals and New Haven. Civil Management Plan and Forms C & D mailed to Atty Williams
"	17	Motion for Transcript. END. Granted on submission of proper authorization form. " Blumenfeld J. m 6/15/77. Copies mailed

A True Copy

ATTEST:

SEYMOUR A. MARKOWSKI

Clerk, U. S. District Court

By: _____

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NAPIER TALTON

VS.

CARL ROBINSON, WARDEN,
CONNECTICUT CORRECTIONAL
INSTITUTION, SOMERS

CIVIL ACTION NO. H-76/401

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

1. The jurisdiction of this Court is invoked under 28 U.S.C. §2241 to release the petitioner from custody of the respondent in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

2. The Petitioner, Napier Talton, hereby applies in amended form, by and through his court-appointed counsel, for a writ of habeas corpus. In support thereof, he respectfully represents:

A. He is now being held and confined by the Respondent pursuant to a Judgment of the Connecticut Superior Court at New Haven.

B. This confinement is illegal for the following reasons:

(1) On April 27, 1973, following a non-jury trial, he was convicted of manslaughter in the first degree in the Superior Court at New Haven.

(2) At his trial he was represented by the Public Defender of the said court.

(3) On May 18, 1973, he was sentenced in the same court on the said charge to a term in the Connecticut Correctional Institution of not less than ten years nor more than twenty years.

(4) A critical portion of his trial was conducted in the chambers of the trial judge, in the Petitioner's absence.

(5) The petitioner had a right under the Sixth and Fourteenth Amendments to the United States Constitution, to be present at the portion of his trial described in subparagraph (4) supra.

(6) The petitioner did not at any time waive his right to be present at the aforesaid portion of his trial conducted in chambers, and the trial record discloses no such waiver.

(7) Following the petitioner's aforesaid sentencing, the public defender was permitted, ²over petitioner's objection, to withdraw from his case and no other attorney was appointed. As a consequence, through no fault of his own, the petitioner lost his right of direct appeal of his conviction.

(8) Subsequently, the petitioner petitioned the Connecticut Superior Court at Hartford for a writ of habeas corpus. Counsel was appointed by that court and the issue presented by this petition was tried in the said court, sitting at Somers. The petition for writ of habeas corpus was denied by the said Superior Court and such denial was affirmed by the Connecticut Supreme Court on August 10, 1976.

(9) EXHIBIT A, hereto annexed, is a copy of the petitioner's brief in the Connecticut Supreme Court.

(10) EXHIBIT B, hereto annexed, is a copy of the decision of the Connecticut Supreme Court in petitioner's case.

(11) EXHIBIT C, hereto annexed, is a copy of the Record on the petitioner's said appeal in the Connecticut Supreme Court.

C. Confinement of the petitioner under the aforesaid circumstances violates his right to be present at all stages of his criminal trial and his right to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

D. The petitioner did not ever waive his aforesaid Constitutional rights and did not at any time acquiesce in their violation as herein described.

WHEREFORE, the petitioner prays that a writ of habeas corpus be issued to bring him before this Court that justice may be done

NAPIER TALTON, Petitioner

BY

JOHN R. WILLIAMS
His Attorney

Dated: November 24, 1976

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NAPIER TALTON)

VS.)

CIVIL ACTION NO. H-76/401

CARL ROBINSON, WARDEN,)
CONNECTICUT CORRECTIONAL)
INSTITUTION, SOMERS)

RESPONDENTS RETURN TO THE AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

1. Paragraph 1 of the Amended Petition is admitted.
2. Paragraph 2A is admitted.
3. The characterization of the Petitioners confinement as illegal is denied, although sub-paragraphs B(1), B(2) and B(3) are admitted.
4. Sub-paragraphs B(4), B(5) and B(6) are denied.
5. As to sub-paragraph B(7), so much of said paragraph as states that the public defender was permitted to withdraw from his case and that no other attorney was appointed is admitted. As to this withdrawal of counsel being "over petitioner's objection" the Respondent has no knowledge and would leave Petitioner to his proof.
6. Sub-paragraph B(8) is admitted.

7. Respondents EXHIBIT A, hereto annexed, is a copy of the Respondent's brief in the Connecticut Supreme Court.

8. Paragraphs C and D are hereby denied.

CARL ROBINSON, WARDEN,
RESPONDENT.

BY Ernest J. Diette, Jr.
ERNEST J. DIETTE, JR.
Assistant State's Attorney

CERTIFICATION

Service certified to all counsel of record this 6th day of December, 1976, to:

John P. Williams, Esq.
265 Church Street
New Haven, Connecticut

Ernest J. Diette, Jr.
ERNEST J. DIETTE, ESQ.
Assistant State's Attorney

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF CONNECTICUT

3 ----- x
4 NAPIER TALTON :

5 vs. :

CIVIL H-76-410

6 CARL ROBINSON, Warden, CCI
7 ----- x

8 FEBRUARY 17, 1977
HARTFORD, CONNECTICUT

9 B E F O R E:

10 HON. M. JOSEPH BLUMENFELD, SENIOR U.S.D.J.

11 EVIDENTIARY HEARING

12
13 A p p e a r a n c e s:

14 For the Petitioner:

15 JOHN WILLIAMS, ESQ.
16 265 Church Street
New Haven, Connecticut

17 For the Respondent:

18 ERNEST DIETTE, ESQ.
19 State's Attorney's Office
20 235 Church Street
New Haven, Connecticut

1 THE COURT: How long are we going to take
2 here?

3 MR. WILLIAMS: Good morning, your Honor.
4 I don't think this hearing will take too
5 long.

6 THE COURT: All right.

7 MR. WILLIAMS: First, I should like to
8 offer on behalf of the petitioner two exhibits
9 which I've already shown to Mr. Diette. They both
10 happen to have state court markings on them because
11 they were used in the state habeas.

12 The first is a transcript of the trial of
13 the petitioner in the Connecticut Superior Court,
14 April 24th, 25th, 26th, and 27th of 1973.

15 THE COURT: Why do I need all that?

16 MR. WILLIAMS: I beg your pardon?

17 THE COURT: Why do I need all that?

18 MR. WILLIAMS: You don't. I'm going to
19 address your Honor's attention to only certain
20 pages, but I thought we would furnish it all.

21 THE COURT: Very well.

22 THE CLERK: Petitioner's Exhibit 1, your
23 Honor?

24 THE COURT: Yes, may be so marked.

25 (Petitioner's Exhibit 1: transcript, full
exhibit.)

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MR. WILLIAMS: As Exhibit 2, your Honor,
I offer the transcript of the petitioner's
sentencing in the Connecticut Superior Court on May
18th, 1973.

THE COURT: His what?

MR. WILLIAMS: His sentencing.

THE COURT: Exhibit 2.

(Petitioner's Exhibit 2: transcript,
marked full exhibit.)

THE COURT: It's not in issue, is it?

MR. WILLIAMS: No, your Honor. This was
just lest there be any question of bypass, which I
think obviously is not since this entire issue was
litigated in state habeas. But I notice that in
one point in the Respondent's return the Respondent
indicated a lack of knowledge as to whether the
Petitioner had, himself, insisted on his right to an
appeal in the state system.

What had happened here, your Honor, was
that the Petitioner was then, as he is now, an
indigent person.

THE COURT: I mean do we have an issue of
denial of a right to appeal?

MR. WILLIAMS: No, I don't think so.

THE COURT: Or impairment of his right to

1 appeal?

2 MR. WILLIAMS: I don't think there is any
3 problem with that, your Honor.

4 I think the only issue here is really, (a)
5 did he have a right to be present at that portion
6 of his trial which was conducted in the Judge's
7 Chambers;

8 THE COURT: All right.

9 MR. WILLIAMS: And (b) if so, did he or did
10 he not waive it.

11 THE COURT: Yes.

12 MR. WILLIAMS: That issue was addressed by
13 the Connecticut Supreme Court, and as your Honor
14 knows from the pleadings the Connecticut Supreme
15 Court ruled that he did have a right to be present
16 in the Judge's Chambers - a federal Constitutional
17 right; but that he had waived it.

18 And on that second point I wish --

19 THE COURT: They placed it on Constitutional
20 grounds, did they?

21 MR. WILLIAMS: Yes.

22 THE COURT: All right.

23 MR. WILLIAMS: And with regard to the
24 question of waiver, I should like to offer brief
25 testimony from the Petitioner at this time.

1 Mr. Talton.

2
3 N A P I E R T A L T O N, called as a witness,
4 being first duly sworn, was examined, and testified
5 as follows:

6 THE CLERK: Would you please state your
7 name?

8 THE WITNESS: Napier Talton.

9 THE CLERK: And your address, Mr. Talton?

10 THE WITNESS: Box 100, Somers, Connecticut.

11 BY THE COURT:

12 Q Mr. Talton, I have a petition from you and it's
13 signed and it has a triangular green stamp on there. What
14 does that represent?

15 A My religious culture, background.

16 Q Your religious cultural background?

17 A Which is the Eastern concept of God.

18 Q The Eastern concept?

19 A Yes.

20 Q And what is in the middle of the triangle?

21 A An eye.

22 Q An eye?

23 A Symbolizing the eye of God watching the actions
24 of all men.

25 Q Watching you? And me?

1 A As well as others, yes.

2 THE COURT: All right.

3 I just wasn't sure what it meant.

4 THE CLERK: Your Honor, I think that
5 perhaps we should ask Mr. Napier Talton if he
6 affirms under penalties of perjury.

7 THE COURT: Go ahead.

8 THE CLERK: I'm going to readminister the
9 affirmation, Mr. Talton, so that we will get it
10 perfectly.

11 (Whereupon, the witness was duly affirmed.)

12 THE COURT: Very well.

13 DIRECT EXAMINATION

14 BY MR. WILLIAMS:

15 Q Mr. Talton, you are familiar with the allegations
16 which have been raised in the amended petition here, are
17 you not, sir?

18 A Yes sir.

19 Q Directing your attention specifically to the
20 point in your state court trial at which the court
21 adjourned and reconvened in the judge's chambers, have you
22 read that portion of your trial transcript which I have,
23 in fact, printed in my brief on your behalf in the state
24 court proceedings?

25 A Yes sir.

1 Q So you're familiar generally with the fact that
2 proceedings were conducted in the judge's chambers in
3 your absence, is that right, sir?

4 A Yes sir.

5 Q Were you at any time advised, prior to those
6 proceedings in the judge's chambers, that you had a right
7 to be there?

8 A I don't -- I don't know. No one ever told me
9 anything. All I know is that they called a recess, I went
10 downstairs and I was sick.

11 THE COURT: You what?

12 A I was sick. I wasn't feeling well. And when I
13 came back they were admitting some things into evidence.

14 And I wasn't familiar with court procedures and
15 I objected to a lot of things that was in there, and they
16 kept saying that, well, we got it in Exhibit so and so, you
17 know, admitted into exhibit.

18 THE COURT: What exhibit are you talking
19 about? A tape of a statement that you made?

20 THE WITNESS: Right, right. The tapes.

21 THE COURT: And a transcript of it?

22 THE WITNESS: And a transcript.

23 They stated that they had them entered into
24 exhibits.

25 THE COURT: Yes. Right.

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8
1 THE WITNESS: And I was contesting that or
2 contending that.

3 THE COURT: You were what?

4 THE WITNESS: I was rebuttalling that.

5 BY THE COURT:

6 Q Yes. Well, you did make a statement, did you?

7 A No, not that I recall.

8 Q You never made a statement that was taken down
9 on tape?

10 A I was talking to the police and they was playing
11 tapes, yes.

12 Q Yes.

13 A Yes.

14 Q And did you ever hear the tape played back?

15 A No sir.

16 Q Do you know now what the tape said?

17 A Through what was written and what I had gotten
18 through the court in written form, yes.

19 Q You know what it said.

20 A Yes.

21 BY MR. WILLIAMS:

22 Q It is true, is it not, sir, that what you know
23 is what the purported transcript says that the tape says,
24 is that correct?

25 A Yes.

15

1 THE COURT: It is a transcript.

2 Q (By Mr. Williams) Have you ever listened to
3 that tape to compare it to this purported transcript?

4 A No sir.

5 BY THE COURT:

6 Q But have you read the transcript?

7 A Yes sir.

8 Q Well, it's accurate, isn't it?

9 A No, no. There was a -- there was a part in it
10 where the judge and I was arguing and it's not in there.

11 Q The part that you were arguing about was not in
12 there?

13 A Right.

14 Q But the part that's there is accurate?

15 A Not completely fairly. Some of it is abrogated,
16 sir.

17 Q Some of it is abrogated?

18 A Yes sir. There's no doubt about that. But
19 that's just mine.

20 Q You know exactly what it was that's abrogated?
21 What are you talking about?

22 A It's some issues where Tralor was on the
23 stand --

24 Q No, no. In the tape. I'm just talking about
25 the tape.

1 A Oh, the tape. No, I don't know exactly where --
2 I don't recall that well back then.

3 Q Well, I mean you read the transcript of the tape.
4 A Yes.

5 Q That's what we're talking about; not the
6 transcript of the whole trial.

7 A Yes, things have been left out and other things
8 are running right together. In other words, there's
9 fact that tapes have a lot of clicks in them; unnecessary
10 clicks.

11 Q Yes.

12 A And even my attorney commented on that in court.

13 Q Right. But you read the part that isn't click,
14 right? You listened to the tape yourself?

15 A No sir.

16 Q Never have?

17 A No sir. No sir. My attorney told me, he said
18 he listened to the tape.

19 Q He said there's some clicks in it?

20 A And it has an excessive amount of clicks in it.

21 Q I see. So you've never compared the transcript
22 that is made by someone who did listen to the tape to see
23 whether that transcript accurately reflects what's on the
24 tape?

25 A In relation to what I have read that was written,

1 I have no other prior information other than what my
2 lawyer told me and what I've read.

3 THE COURT: I see.

4 What are we talking about, something
5 academic here?

6 MR. WILLIAMS: I think not, your Honor.

7 As a matter of fact, I think that Justice
8 Loiselles pretty much --

9 THE COURT: I'm not talking about Justice
10 Loiselles.

11 MR. WILLIAMS: I know you're not, your
12 Honor. But what I'm trying to say --

13 THE COURT: I'm talking about this case now.
14 And you're claiming some injury or defeat of
15 his Constitutional rights by reason of the
16 admission of a tape?

17 MR. WILLIAMS: That's correct.

18 THE COURT: And a transcript of that tape?

19 MR. WILLIAMS: Well, not just the admission
20 of it, your Honor.

21 The tape was played -- First of all, this
22 was a bench trial. There was no jury. The tape
23 was played for the judge in this man's absence.

24 THE COURT: Well, this was a trial to the
25 judge, right?

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MR. WILLIAMS: That's correct.

THE COURT: And then the tape was put in evidence.

MR. WILLIAMS: After having been played in a court proceeding conducted in chambers in the absence of this man.

THE COURT: All right.

Now the question is do you contend that, in any way, the tape is inaccurate?

MR. WILLIAMS: I have no idea. I wasn't present when he made the statement. Nobody was there except this man, Judge. That's the problem.

THE COURT: Well, nobody, right. That's the problem.

MR. WILLIAMS: Only this man can answer the question, and he was not permitted to hear it.

That very issue - and this is what I was trying to say about Justice Loisel's opinion for the Connecticut Supreme Court --

THE COURT: Well, wait a minute.

Somebody heard it.

MR. WILLIAMS: Oh, yes. The trial judge heard it.

THE COURT: Did you? You heard it?

MR. WILLIAMS: No, I did not.

1 THE COURT: Well, who did? I mean suppose
2 the tape says it was raining that day, or the
3 wind was out of the east.

4 MR. WILLIAMS: Well, your Honor, you cut
5 me off as I was about to ask him the question.

6 THE COURT: No, I'm talking to you. He says
7 he never heard it either.

8 MR. WILLIAMS: That's right.

9 THE COURT: So what are we talking about?
10 We're talking about a piece of tape that came
11 in and what significance did it have in the trial.

12 MR. WILLIAMS: Precisely.

13 THE COURT: What?

14 MR. WILLIAMS: That is what we are talking
15 about.

16 And that issue, as I was trying to say to
17 you before you cut me off, is fully addressed in
18 the opinion of the Connecticut Supreme Court,
19 which agrees that it had great significance and
20 that, indeed, he was deprived of a fundamental
21 right at his trial by being kept out of the
22 judge's chambers when it was played.

23 THE COURT: Well, I'm asking you. What
24 did the tape say?

25 MR. WILLIAMS: Judge, I have never heard

1 the tape because what I was trying to point out
2 to the Court --

3 THE COURT: Well, do you want me to listen
4 to the tape and find out whether it was
5 important or not?

6 MR. WILLIAMS: I think that it is conceded
7 that it is important.

8 THE COURT: What?

9 MR. WILLIAMS: I think that it is conceded
10 that it was important.

11 There is in the transcript which you have
12 before you --

13 THE COURT: Well, all right. Let's take
14 the next step, then.

15 You concede that it was important to the
16 finding of guilt or innocence, is that right?

17 MR. WILLIAMS: That's correct, your Honor.

18 THE COURT: Do you contend that it's
19 inaccurate as submitted?

20 MR. WILLIAMS: I have no way of knowing
21 its precise --

22 THE COURT: What do you want me to do?
23 Guess whether it's inaccurate?

24 MR. WILLIAMS: What I want you to do is to
25 conclude, number one, that he had a right to be

21

1 there when it was played. Because who else knows
2 whether it was accurate except this man who's
3 sitting in the witness chair.

4 Number two, that he didn't waive the right of
5 presence. And that entire issue has been fully
6 discussed in the papers which are before you,
7 your Honor, and it seems to me that --

8 THE COURT: Well, suppose that it is wholly
9 accurate.

10 MR. WILLIAMS: Yes, your Honor.

11 THE COURT: Right?

12 MR. WILLIAMS: Yes, your Honor.

13 THE COURT: What harm has occurred here
14 if it's wholly accurate? An improper ruling on
15 the admissibility of a piece of evidence?

16 MR. WILLIAMS: No.

17 THE COURT: Well, that's all it is, a piece
18 of evidence came in.

19 MR. WILLIAMS: The tape was supposedly of a
20 statement that this man made to the police.

21 THE COURT: Well, he told me that he made a
22 statement and they had a tape machine there, so
23 he knows he made a statement on tape.

24 MR. WILLIAMS: The issue that was discussed
25 at the time of the trial and in the opinion on

1 appeal from the state habeas was that there were
2 all kinds of problems of inflections, and pauses,
3 and so forth, which as the Supreme Court of
4 Connecticut pointed out only he could properly
5 have brought to the attention of his counsel and
6 the trial judge.

7 THE COURT: So?

8 MR. WILLIAMS: And that by denying him the
9 right to be present when it was played he was
10 thereby denied a fundamental right at his own
11 trial. That's the point.

12 I think the only issue that is really
13 seriously contested before you is the question
14 of whether or not he waived his right of being
15 present.

16 THE COURT: It may be the only issue that
17 counsel have zeroed in on. But it's not the only
18 one in the case.

19 MR. WILLIAMS: It may be your Honor sees
20 other issues.

21 THE COURT: What's that?

22 MR. WILLIAMS: I say perhaps you do see
23 issues that we have missed. That certainly may
24 be so. You're much more experienced than we are.

25 THE COURT: Well, I'm not so sure. Because

1 I don't think it's a matter of experience.

2 MR. WILLIAMS: But it is my view.

3 THE COURT: Well, go ahead, put on your
4 case.

5 MR. WILLIAMS: Very well. Thank you.

6 BY MR. WILLIAMS:

7 Q Is it true, sir, that the attorney who
8 represented you at your trial was Mr. DeMayo, the Public
9 Defender in the Superior Court?

10 A Yes sir.

11 Q And when you referred to your attorney in the
12 context of that state trial you are referring to Mr.
13 DeMayo, is that correct?

14 A Yes sir.

15 Q Now, it is also true, is it not, that Mr. DeMayo
16 told you that it seemed to him that there were clicks,
17 and pauses, and changes in inflection on that tape which
18 might be something that you would want to know about?

19 A Yes sir.

20 BY THE COURT:

21 Q When did he tell you?

22 A He told me after I had came -- after I had --
23 not only after I came back, but after they had called a
24 recess or whatever.

25 Q But before the trial was over?

1 A No, no sir. He told me after. That next --

2 Q When you say "after", the same day?

3 A Yes sir. When I came back from --

4 Q Well, now while this tape was being played before
5 the judge, you know now that that's when they took a
6 recess, that's what they did?

7 A I came back from recess -- from lunch. We
8 had a portion of the trial and I was arguing certain issues
9 with the Honorable Justice.

10 Then after he had intervened again or called a
11 lunch break or whatever, that was when Mr. DeMayo told me.
12 I had went to the jury room and he had came and told me.

13 Q It was on the same day, though?

14 A Yes.

15 Q And before the trial was finished?

16 A Yes sir.

17 Q During a recess.

18 THE COURT: All right.

19 BY MR. WILLIAMS:

20 Q Now, at any time were you offered an opportunity
21 to be present at the time that that tape was played for
22 the judge?

23 A No sir.

24 Q And when you say that you were not feeling well,
25 what do you mean by that?

1 A Well, I was -- the whole case was centered
2 around a sanity plea, and I was on drugs and I was having
3 some problems there, in that area.

4 When you say you were on drugs, do you know what
5 drugs y u were on?

6 A Yes sir. I was on lysergic acid.

7 Q During your trial?

8 A No sir, not during my trial; but I was suffering
9 the effects of LSD.

10 Q And the LSD was something that you had used prior
11 to the time that you had been arrested, is that right?

12 A Yes sir.

13 BY THE COURT:

14 Q What do you mean, suffering the effects?

15 A I was having hallucinations and headaches.

16 Q You had had LSD shortly before this trial?

17 A I had had it -- the last time I had had LSD
18 was the time that I was arrested, about the time that I
19 was arrested, which I was taken into the St. Raphael's
20 Hospital in New Haven and they had nothing really relevant
21 to offer, although there were traces of strychnine in my
22 blood.

23 Q All right. Were you brought to trial the next
24 day? Or how many days was it before you had this trial?

25 A I was arrested, I believe that I was brought in

1 court the next day.

2 Q Is that the day they had the trial?

3 A Low court. No. Low court.

4 But during the time that I was in Whalley Avenue
5 in New Haven I was still having problems, as I tried to get
6 psychiatrists, doctors to tell me.

7 Q You know, Mr. Talton, I don't know what all
8 your problems are. But were you still on LSD?

9 A I wasn't taking LSD, no.

10 Q You weren't taking any?

11 A No sir.

12 Q All right. Did you understand me: How long
13 after that was it before this trial took place?

14 A Oh.

15 Q A matter of weeks? Months?

16 A A total of something like 16 months.

17 Q Sixteen months?

18 A Later I had the trial, yes sir.

19 Q Well, were you on LSD during that 16 months?

20 A No sir.

21 Q You say that then 16 months later you were still
22 suffering effects of the LSD?

23 A I just stopped suffering the effects recently.

24 Q And how many years is it now?

25 A About five and a half years now.

1 BY MR. WILLIAMS:

2 Q And when you speak of the effects of LSD, the
3 effects which lingered long after you had stopped actually
4 ingesting it, what are you talking about, what do you mean?

5 A Tiredness. Like since I've been up Somers
6 prison --

7 THE COURT: Well, I don't know. I don't
8 think I want to get into all this.

9 MR. WILLIAMS: Fine.

10 THE COURT: Because you're not claiming --
11 Is this by way of showing that he did not waive
12 because he didn't know what he was doing?

13 MR. WILLIAMS: Judge, actually it came up
14 only because I wanted him to clarify what he
15 meant when he said he wasn't feeling well at the
16 time of trial.

17 Q What did you mean by that?

18 THE COURT: I'm sorry. You got me started
19 off on that.

20 A I felt tired, and I still have the problem
21 today; I get tired very easy, I have headaches, nauseating.

22 Q Sir, Mr. Talton, just at the time of the trial,
23 you just said at the time of the trial you weren't feeling
24 well?

25 A Right.

1 Q What wasn't feeling well?

2 A I was having visual and audio problems.

3 THE COURT: Well, do you suppose if you
4 listened to that tape you would have understood
5 what was on there, or were you so mixed up
6 mentally that it wouldn't have done you any good
7 to listen to the tape?

8 THE WITNESS: To tell you the truth, your
9 Honor, I don't know. I'm not sure. I can't say
10 for sure.

11 THE COURT: You don't know.

12 MR. WILLIAMS: I have no further questions.

13 CROSS EXAMINATION

14 BY MR. DIETTE:

15 Q Mr. Talton, I have just a couple of questions.

16 You have seen, I assume, the decision of the
17 State Supreme Court of Connecticut.

18 A Yes sir.

19 Q And did you see in there the footnote on page 2
20 which described the statements of your counsel, Mr. DeMayo,
21 at the time of this incident that was discussed?

22 A Yes sir. Although I can't remember the exact
23 word for word.

24 Q Okay. But since that is a transcript of what
25 took place at your trial, did you hear Mr. DeMayo say, as

1 quoted in that decision: "I would have to concede that
2 the tape and the statement are so close that they are
3 basically the same item"?

4 Do you recall him having said that?

5 A No sir.

6 Q You have no recollection whatsoever?

7 A No sir.

8 Q Do you think, based on what you just told us
9 about your problems with the after effects of LSD, that
10 you do not remember that because of those effects, or is
11 it because it was not said?

12 A I couldn't say for sure. But I doubt very much
13 if it was said because things were pretty well amplified
14 in my ear at the time. I'm quite sure I would have caught
15 that.

16 Q Do you recall Mr. DeMayo having a discussion with
17 the court after this incident occurred outside of your
18 presence?

19 A No sir.

20 Q You have no recollection of that conversation
21 at all?

22 A No sir. No sir.

23 Q Then you did not hear Mr. DeMayo say, and I'm
24 again quoting from his quoted words in the Supreme Court
25 decision: "He indicated to me no" - this is in regard to

1 the question of your being present at the hearing outside
2 in the judge's chambers and whether you wanted to go, and
3 Mr. DeMayo said:

4 "He indicated to me no, he was upset, tired and he
5 would rather not" - that is, go into the chambers.

6 Do you recall that having been said?

7 A I recall him saying that I was upset and tired
8 and he wanted to intervene or whatever, you know, recess.

9 Q Yet you had no objection to that at that time?

10 A No, because I wasn't feeling well.

11 Q Because you weren't feeling well.

12 BY THE COURT:

13 Q Well, this was during the trial, right?

14 A The trial was -- yes sir.

15 Q And there came a time when they said, well, let's
16 go into recess and let's go in and hear this tape?

17 A No sir, I don't recall that. I remember them
18 calling a recess.

19 Q Calling a recess.

20 A And Mr. DeMayo telling them I wasn't feeling
21 well.

22 Q So something happened then, because you said
23 to your lawyer, DeMayo, "No, I'm not feeling well. I'm a
24 little upset"? What did you say no about?

25 A I asked him if we could have -- I had asked him

1 prior, before he addressed the court, if we could have a
2 recess because I'm not feeling well. So he asked me, "Do
3 you feel sick?"

4 Q Well, he got you a recess, is that what you're
5 saying?

6 A Yes sir.

7 Q Well, you knew that recess was to go in and
8 listen to the tape?

9 A No sir, I did not know that.

10 Q Where were you?

11 A I was there, evidently. I guess, you know.

12 Q You guess you were there.

13 And your lawyer said, "Come on in"; and you say,
14 "No, I'd rather not. I'm tired".

15 You don't remember saying that?

16 A I remember telling him I was tired, I didn't
17 feel good.

18 Q And you didn't want to go in?

19 A No sir. .

20 Q Where did you go?

21 A I went downstairs, rested a while, and went to
22 the bathroom, and I think I had a sandwich. Then we came
23 back up. How much time elapsed I couldn't say for sure.

24 Q So if your lawyer says that he asked you to go
25 in there, you say that's not so?

- 1 A I don't recall him asking me.
- 2 Q You don't recall him.
- 3 A No sir.
- 4 Q That's what you're saying now.
- 5 A I don't remember him asking me. I don't remember
6 anything about it.
- 7 Q You don't remember. And he says that he did ask
8 you. You say that he's not telling the truth?
- 9 A That would have to be it because I definitely
10 did argue against him in court at the sentencing procedures.
11 I argued against him.
- 12 Q Now you're under affirmation.
- 13 A Yes sir.
- 14 Q What do you mean that would definitely have to
15 be it?
- 16 A You know, in my opinion. In my opinion. I
17 spoke --
- 18 Q You mean now figuring out what you probably
19 would have done at the time, is that what you mean?
- 20 A No sir, no sir. I spoke directly against --
- 21 Q Well, he says definitely that he asked you. Now
22 you say he didn't?
- 23 A I'm saying definitely that he did not ask me that
24 and I don't recall him asking me.
- 25 THE COURT: All right. Go ahead.

1 BY MR. DIETTE:

2 Q Just one final question, and perhaps I asked
3 this before, but you did hear him say, did you not, that
4 he had asked you and that you were upset and tired and did
5 not want to go into that hearing?

6 A No sir, I don't recall that.

7 Q You don't recall.

8 THE COURT: You mean he said this at another
9 time?

10 You had a habeas corpus hearing in the
11 state court, didn't you?

12 THE WITNESS: Yes sir, Superior Court.

13 THE COURT: Yes. And was Mr. DeMayo there?

14 THE WITNESS: Yes sir.

15 THE COURT: And did he testify?

16 THE WITNESS: Testify? Mr. DeMayo?

17 THE COURT: Yes. Did he?

18 MR. WILLIAMS: No, your Honor.

19 THE COURT: How did his statement get into--

20 MR. WILLIAMS: That's at the time of the
21 trial, your Honor.

22 Mr. DeMayo simply, and that's in the
23 transcript Exhibit Number 1, Mr. DeMayo --

24 THE COURT: At the time of trial.

25 MR. WILLIAMS: At the time of trial after

1 the proceeding in chambers had been conducted and
2 concluded, Mr. DeMayo made some comment to the
3 judge on the record to the effect that Mr.
4 Talton wasn't feeling well, that he had asked
5 him about coming to chambers -- that is quoted
6 in the footnote to which Mr. Diette referred
7 in the Connecticut Supreme Court opinion.

8 But that was all at the time of trial.
9 Mr. DeMayo did not testify at the state habeas
10 corpus petition, nor did Mr. Talton, by the way.

11 THE COURT: All right.

12 So this was on the record at the time of
13 trial?

14 MR. WILLIAMS: That's correct.

15 BY THE COURT:

16 Q Now, you remember the trial when after this
17 recess and you went down not feeling well and went to the
18 bathroom and had a sandwich, a cup of coffee, too?

19 A I believe I did have a cup of coffee. But
20 can I say something, your Honor?

21 Q What?

22 A Something very important you should know.

23 Q What's that?

24 A Something very important you should know. Mr.
25 DeMayo kept walking up to where the judge's bench was. I

1 was exactly a distance about almost to the back of the
2 courtroom. A lot of times I could not hear when he had his
3 back to me what was being said. And that's the way this
4 man can verify that that New Haven Superior Court is
5 designed.

6 Q So you're saying now that -- you're trying to
7 suggest that if he did say that --

8 A I didn't hear him.

9 Q -- after a recess, you didn't hear him?

10 A I did not hear. I didn't hear. Because a lot
11 of times he had his back to me.

12 THE COURT: All right.

13 MR. DIETTE: I have no further questions.

14 THE COURT: Now, let's see. What were you
15 convicted of?

16 THE WITNESS: Manslaughter. Got 10-to-20
17 years. Grand Jury refused to indict me; they
18 didn't find enough evidence.

19 THE COURT: Manslaughter?

20 THE WITNESS: Yes sir.

21 THE COURT: Anything further?

22 MR. WILLIAMS: Nothing further, your Honor.

23 THE WITNESS: As a matter of fact, the Grand
24 Jury said they should let me go. Judge O'Sullivan
25 got angry with that.

1 THE COURT: What?

2 THE WITNESS: Judge O'Sullivan got angry,
3 and one of the jury members said they ain't got
4 enough evidence, they should let me go. So I
5 was charged with manslaughter.

6 THE COURT: Well, somebody got killed?

7 THE WITNESS: Yes sir. That's what they
8 say.

9 THE COURT: You don't know?

10 THE WITNESS: Well, that was my whole
11 contention right there, that I didn't know what
12 had happened. And that's why the argument's
13 around them tapes.

14 THE COURT: I see.

15 You were under LSD, is that it?

16 THE WITNESS: Yes sir.

17 THE COURT: All right.

18 MR. WILLIAMS: Nothing further, your Honor.

19 (witness excused)

20 MR. WILLIAMS: I have no further evidence,
21 your Honor.

22 I would like a short time with which to
23 submit a brief to the Court. And in that brief
24 I would direct your attention to the portions
25 of the exhibits that I think are relevant.

1 THE COURT: If you're going to write a
2 brief, I'm interested in the question of whether
3 there's anything more than a problem of authen-
4 ticity of evidence and, therefore, just a ruling
5 on evidence that's involved here.

6 Because as I see it it's conceivable on
7 analysis that all we have here is a question of
8 whether a tape that is submitted in evidence
9 must first be submitted to the defendant for
10 his authenticity before it can be submitted to
11 a trier.

12 Now, the fact that the evidence in this
13 case was important -- let's assume. I'm not
14 right on top of the details in this case, but
15 let's assume that there were damaging admissions
16 there. I do not want to confuse this admission
17 into evidence of damaging testimony as being
18 constitutionally impermissible because it was
19 coerced as distinguished from its being consti-
20 tutionally inadmissible because it was not
21 authenticated under a certain procedure which
22 would require the defendant to hear it himself
23 before it was admitted into evidence.

24 All I see in this case is it's a question
25 of is this method of authenticity constitution-

1 ally required.

2 I guess I wasn't very clear when I said
3 earlier what difference would it make if it
4 just had to do with the weather conditions
5 that day.

6 But even if it were akin to a confession,
7 so long as it is not claimed to have been
8 coerced, the only claim we have here, as I see
9 it, is that the authenticity requirements were
10 not met. It's a question that occurs to me and
11 was not raised by the Supreme Court.

12 MR. WILLIAMS: I'd be happy to address that
13 question in my brief, your Honor.

14 THE COURT: All right.

15 And you, as well, counselor.

16 MR. DIETTE: Yes, your Honor.

17 THE COURT: How long do you want?

18 MR. WILLIAMS: Ten days?

19 THE COURT: All right.

20 Since you know what the issue is, that's
21 long enough.

22 MR. WILLIAMS: Yes, your Honor.

23 THE COURT: Now, another thing here. We've
24 got a man here who's in jail for ten years; in
25 prison. Now, he claims that he didn't know what

1 was going on, therefore he didn't waive.

2 You've got his lawyer who apparently made
3 a statement in open court at the time the
4 incident took place, which I would have to give
5 great weight to, I believe, as a judge. Because
6 this is not an afterthought, this is while the
7 thing is going on. He says: I talked to my
8 client and he said he didn't feel well, he's
9 tired and doesn't want to come in.

10 Now it seems to me if I can accept that - and
11 I suppose I can since it's here in the record -
12 it's a pretty hard role --

13 MR. WILLIAMS: Well, I think the issue,
14 your Honor, is whether counsel can waive this
15 right for a defendant.

16 THE COURT: I didn't read exactly what
17 DeMayo said at the time. But I understood it
18 was that he asked his client if he wanted to
19 come in; and his client said no, that he didn't
20 feel well. And I don't know that that would be
21 not informing him.

22 And then later telling him, you know, I
23 listened to it, but I heard some clicks there
24 and so forth, and this didn't provoke anything
25 from the client.

40

1 And I asked him whether anything was in
2 there, has he listened to it since and was it
3 in fact incorrect. And he hasn't done that, and
4 neither have you.

5 MR. WILLIAMS: That's correct, your Honor.

6 THE COURT: As I say, what we're talking
7 about may be perfectly -- would never have been,
8 without waiver, would never have been any reason
9 for excluding that or raising a question about
10 it - all of which really sort of highlights the
11 question of authenticity as distinct from
12 objectionability on some other ground.

13 All right. Thank you, gentlemen.

14 MR. WILLIAMS: Thank you, your Honor.

15 MR. DIETTE: Excuse me, your Honor.

16 Did you set ten days for his brief? Is
17 that ten days for both briefs?

18 THE COURT: Sure. You don't need to respond
19 to his. You know what the issue is.

20 MR. DIETTE: I would think so.

21 THE COURT: Right?

22 MR. DIETTE: Fine.

23 THE COURT: Is that long enough for you?

24 MR. DIETTE: Yes, your Honor.

25 THE COURT: All right. Recess.

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*

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NAPIER TALTON

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v.

:

CIVIL NO. H-76-401

CARL ROBINSON, WARDEN,
CONNECTICUT CORRECTIONAL
INSTITUTION, SOMERS

:

:

MEMORANDUM OF DECISION

In April 1973, following a bench trial in Connecticut state court, Napier Talton was convicted of manslaughter in the first degree. He claims that the state trial was conducted in violation of his constitutional rights because the court held an in-chambers proceeding in his absence. Having sought and been denied collateral relief in the state courts, Talton v. Warden, 38 Conn. L.J. 1 (Aug. 10, 1976), Talton now petitions this court for a writ of habeas corpus. 28 U.S.C. § 2254. An evidentiary hearing has been held and the parties have briefed the legal issues.

I.

Following his arrest, Talton made an oral confession to New Haven police detectives. This confession was tape-recorded and was later transcribed. During the trial, the state's attorney offered this transcript, which was signed by Talton,^{1/} into evidence. Talton's trial counsel indicated

^{1/} Trial transcript at 23.

that he had no objection to the admission of the transcript provided that he had an opportunity to hear the tape-recording from which it was transcribed.^{2/} The court admitted the transcript into evidence subject to defense counsel's request to hear the tapes.

At this point, the court recessed and reconvened in chambers where the tapes were played in the presence of the judge, the clerk of the court, the state's attorney, Talton's counsel, two New Haven police detectives and the court reporter; Talton was not present. Following the playing of the tapes and without any discussion in chambers, proceedings were reconvened in the courtroom. At this point, the state's attorney offered the tapes into evidence and requested that they be played again in open court.^{3/} Talton's counsel then made the following statement:

"I would object to the introduction of the tapes and to playing them again, your Honor, for this reason. Your Honor and I both have heard the entire playing of the tapes. It has consumed some 25 minutes, I suspect, or perhaps more, and I would have to concede that the tape and the statement are so close that they are basically the same item. There may be a few expletives or pauses that were missed, but to the best of a human's ability, I would have to concede that one follows the other. I don't think they have to be played again for

^{2/} Trial transcript at 24.

^{3/} Trial transcript at 26.

your Honor's benefit because your Honor sat and followed word for word the entire statement in chambers.

"I have an additional reason. When we recessed to hear these tapes in chambers, I asked the defendant if he wanted to be present for that session and he indicated to me no, he was upset, tired, and he would rather not.

"Your Honor will note that my defense in this case is an insanity defense, indicating a charged-up emotional situation, and the defendant has some deep emotional problems. Playing them in the courtroom again would serve no purpose. Your Honor is the judge of the facts and the law here. You have heard them once and I don't believe that playing them again would serve any purpose."

Trial transcript at 27-28.

Upon inquiry from the court, defense counsel indicated that he had no objection to the admission of the tapes, without having them replayed.^{4/} The tapes were then marked as full exhibits.

II.

The crux of petitioner's claim is that he was denied his constitutional right to be present during all portions of his trial. The Supreme Court of Connecticut agreed that Talton had a constitutional right to be present in chambers during the playing of the tapes. However, that court denied habeas relief, finding that Talton had waived this right to be present. "It is clear that [Talton] should have known

^{4/}

Trial transcript at 28-29.

what was going to happen in chambers. [Defense] [c]ounsel's statement also indicates that, knowing he could attend, [Talton] intentionally chose not to." Talton v. Warden, supra, 38 Conn. L.J. at 4.

Therefore, in analyzing petitioner's claim, the initial inquiry must be whether he had a constitutional right to be present in chambers during the playing of the tapes. If such a constitutional right existed, the remaining questions are whether Talton waived that right and, if not, whether any prejudice resulted from the constitutional deprivation.

A.

As a general proposition, it is well-established that a defendant has a constitutional right to be present during his trial. However, the concern here is not with the validity of this general proposition, but rather with whether the right extends to the in-chambers proceedings conducted in this case. The right to be present is derived both from the confrontation clause of the sixth amendment, Illinois v. Allen, 397 U.S. 337, 338 (1970), and from the due process clause of the fourteenth amendment, Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934).^{5/} In this context, the dual

^{5/}

Of course, the two sources of the right to be present have now been largely merged because of the incorporation of the right of confrontation into the due process clause of the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965). However, the delineation of the two distinct policies underlying the right to be present is still a valid springboard for analysis.

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source of the right is instructive, for it helps to delineate both the purposes and the scope of the right of a defendant to be present during his trial.

The confrontation clause establishes the right of an accused to confront and test the testimony of his accusers. Because it is designed to implement this right of confrontation, this aspect of the right to be present is mainly concerned with the stages of trial in which there are witnesses to be questioned. Id. at 107. The due process clause, however, is somewhat wider in impact, for it requires the presence of the defendant "to the extent that a fair and just hearing would be thwarted by his absence" Id. at 108. Therefore, the due process clause mandates the presence of the defendant "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Id. at 105-06.

However, neither source of the right to be present supports an extension of that right to the in-chambers proceedings in this case. These proceedings were conducted for the sole purpose of testing the authenticity of a transcript of a tape-recorded confession. The proper procedure for authenticating a transcript is for the court to listen to the tapes in camera in order to compare them with the transcript. United States v. Chiarizio, 525 F.2d 289, 293-94 (2d Cir. 1975); United States v. Carson, 464 F.2d 424, 436-37 (2d Cir. 1972). Such an in camera proceeding may be unnecessary in a

bench trial; in any event, the procedure followed in this case was surely not improper.

The due process clause does not require the presence of the defendant "when his presence would be useless, or benefit but a shadow." Snyder v. Massachusetts, supra, 291 U.S. at 106-07. For this reason, the right to be present does not extend to in-chambers discussions of points of law. See United States v. Gregorio, 497 F.2d 1253, 1258-60 (4th Cir.), cert. denied, 419 U.S. 1024 (1974). In light of the purposes of the in-chambers proceedings in this case, petitioner's presence had no "relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." His presence was not necessary to the proper determination of whether the tapes were accurately transcribed. He was in no better position to compare the tapes to the transcript than was the trial court or counsel.

Furthermore, no colloquy concerning the contents or accuracy of the tapes occurred in Talton's absence; nor did any witness testify in his absence. As such, petitioner's presence in chambers was not necessary to the full exercise of his right to confront and cross-examine witnesses.

Petitioner claims and the state Supreme Court has held that his presence was constitutionally required because "[a]t the introduction of the tapes, [he] would have had an opportunity to assist his counsel by explaining the features of the tape recording. He would have had the opportunity to

advise his counsel on the accuracy of the tapes and on any defects in the reproduction of the tapes." Talton v. Warden, supra, 38 Conn. L.J. at 3. However, this analysis overlooks the limited purpose of the in-chambers proceedings. They were conducted solely for the purpose of determining the authenticity and admissibility of the transcript, not the tapes. The tapes were offered into evidence after the in-chambers proceedings. The state's attorney asked to play the tapes again, but defense counsel objected. Talton was present at this point of the trial. While he might have aided counsel in determining whether the tapes themselves were defective, this opportunity was lost solely because of a strategic decision of his counsel (for which he cannot be faulted) that it was not in his client's best interest to have the tapes played again. Therefore, I cannot agree that petitioner's opportunity to defend was prejudiced by his absence from the in-chambers proceeding.

B.

Even if it is assumed arguendo that petitioner had a constitutional right to be present at the in-chambers proceedings, habeas relief would not be appropriate in this case. First, the record reveals that Talton waived any right he had to be present in chambers. While it would have been preferable for the court to have questioned him directly, the failure to do so does not preclude a finding that Talton knowingly, intentionally, and voluntarily waived his right to

be present. Talton knew what was transpiring in chambers.^{6/} He was present when his counsel informed the court that he did not want to be present to hear the tapes. He did not object at that time, nor did his testimony at the hearing before this court indicate that he wanted to be present during the playing of the tapes in chambers. United States v. Sinclair, 438 F.2d 50, 52 (5th Cir. 1971). In these circumstances, waiver may properly be implied from his conduct. See United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, 409 U.S. 1063 (1972).

Secondly, petitioner has not demonstrated that any prejudice resulted from his absence from the in-chambers proceedings. United States v. Sinclair, supra, 438 F.2d at 52. This lack of prejudice has already been discussed in

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It should be noted that an additional reason for the right to be present has been articulated, that is,

"assuring nondisruptive defendants the opportunity to observe--and, it is to be hoped, to understand--all stages of the trial not involving purely legal matters generally incomprehensible to the layman in order to prevent the loss of confidence in courts as instruments of justice which secret trials would engender."

United States v. Gregorio, 497 F.2d 1253, 1258 (4th Cir.), cert. denied, 419 U.S. 1024 (1974) (footnotes omitted); Snyder v. Massachusetts, 291 U.S. 97, 131-32 (1934) (Robert, J. dissenting).

In the present case, this interest was not significantly undermined by Talton's absence from the in-chambers proceedings. The record is clear that he was present both before and after the in-chambers playing of the tapes and that he knew what was transpiring. If he suffers from any disillusionment with the judicial process, it cannot fairly result from any denial of his right to be present.

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terms of the existence of his constitutional right to be present. At this point, I add only the following: Talton signed the transcript of his confession and there has been no claim that that confession was obtained involuntarily; petitioner has never asserted that the tapes were in any way defective or tampered with; neither the tapes nor the transcript had a bearing on the main thrust of his defense which was a claim of insanity. For all of these reasons, even if there existed a constitutional right to be present which petitioner had not waived, any deprivation of that right in the circumstances of his trial was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); United States v. Huntley, 535 F.2d 1400, 1404 (5th Cir. 1976), cert. denied, 45 U.S.L.W. 3627 (March 22, 1977).

The petition for a writ of habeas corpus is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 23rd day of May, 1977.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NAPIER TALTON

v.

CARL ROBINSON, WARDEN,
CONNECTICUT CORRECTIONAL
INSTITUTION, SOMERS

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CIVIL ACTION NO. H-76-401

JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, Senior United States District Judge, of the Petitioner's Petition for a Writ of Habeas Corpus; and,

After a hearing on the merits and consideration of all the papers filed in connection therewith, the Court filed its Memorandum of Decision denying and dismissing the Petitioner's Petition;

It is therefore accordingly ORDERED and ADJUDGED that the Petitioner's Petition for a Writ of Habeas Corpus be and is hereby denied and dismissed.

Dated at Hartford, Connecticut, this 25th day of May,
1977.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: *[Signature]*
Deputy-in-Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED

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NAPIER TALTON

VS.

CARL ROBINSON, WARDEN
CONNECTICUT CORRECTIONAL
INSTITUTION, SOMERS.

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CIVIL ACTION NO. H-76-401

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, Napier Talton, appeals to the United States Court of Appeals for the Second Circuit from the Judgment in this case entered on May 25, 1977, by the Honorable M. Joseph Blumenfeld, United States District Judge.

Dated: June 1, 1977

BY


JOHN R. WILLIAMS
265 Church Street
New Haven, Connecticut
06510

Attorney for Petitioner

the plaintiff's motions to postpone is without merit.

[2] The plaintiff claims error in the ruling on evidence whereby the defendant was allowed to testify as to his opinion on the future progress of the children in Swedish schools. The plaintiff objected on the ground that the defendant had not demonstrated any knowledgeability regarding the Swedish school system. The court ruled that a proper foundation on knowledgeability had been laid in the defendant's prior testimony. That testimony, regarding the courses taken by the boys, their language problems, and the extent of mandatory education in Sweden, had been admitted without objection by the plaintiff. It cannot be found that the court was in error in determining that a proper foundation had been laid.

[3] The plaintiff's final claim, that the court erred in finding that the best interests of the children would be served by a custodial transfer to the defendant, is based principally on the view that the court did not have sufficient evidence to reach that conclusion, as the plaintiff was not given an opportunity to give her testimony or deposition. Considering the fact that almost three months had elapsed between the time the hearing was first scheduled and the time when it was finally terminated, the defendant's offer to fly the plaintiff to this country, and the fact that no reason was given for the plaintiff's absence other than that she was in Sweden, the court was not in error in considering the issue raised on the evidence presented.

There is no error.

Napier TALTON

v.

WARDEN, CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS.

Supreme Court of Connecticut.

Aug. 10, 1976.

Petitioner, who had been convicted of manslaughter, sought habeas corpus relief. The Superior Court, Hartford County, John F. Shea, J., denied petition, and petitioner appealed. The Supreme Court, Loiselle, J., held that petitioner had constitutional right to be present at proceeding in chambers which was convened to verify accuracy of written transcription of tape recording containing detective's interrogation of petitioner, but that petitioner waived such right.

No error.

1. Constitutional Law ⇐268(6)

Fourteenth Amendment guarantees right of accused to be present during state trial. U.S.C.A.Const. Amend. 14.

2. Criminal Law ⇐636(3)

Accused had constitutional right to be present at proceeding in chambers which was convened to verify accuracy of written transcription of tape recording containing detective's interrogation of accused and in which trial judge heard recording for first time. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐636(1)

Accused's right to be present at trial may be lost by consent, waiver or misconduct. U.S.C.A.Const. Amend. 14.

4. Criminal Law ⇐636(1)

Procedure wherein accused is brought before court, advised of right to be present at trial and then permitted to make an intelligent and competent waiver of such right is not a prerequisite before there can be a waiver of that right. U.S.C.A.Const. Amend. 14.



5. Estoppel ⇐ 52.10(2)

"Waiver" is the intentional relinquishment of a known right.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐ 636(1)

Accused waived his right to be present at proceeding in chambers, which was convened to verify accuracy of written transcription of tape recording containing detective's interrogation of accused and in which trial judge heard recording for first time, where accused was asked if he wanted to be present, his counsel gave accused's purported negative response in accused's presence and there was no indication of coercion, no suggestion that accused would get better treatment if he absented himself from chambers and no indication of any communication problem between counsel and accused. U.S.C.A.Const. Amend. 14.

7. Attorney and Client ⇐ 92

Once accused has assistance of counsel, the strategic and tactical decisions, which must be made before and during trial, rest with accused and his attorney.

John R. Williams, New Haven, for appellant (plaintiff).

Ernest J. Diette, Jr., Asst. State's Atty., with whom, on the brief, was Arnold Markle, State's Atty., for appellee (defendant).

Before HOUSE, C. J., and LOISELLE, BOGDANSKI, LONGO and BARBER, JJ.

LOISELLE, Associate Justice.

The plaintiff, Napier Talton, filed a petition for a writ of habeas corpus claiming that he was confined in the Connecticut correctional institution at Somers without law or right because, among other reasons,

1. Defense counsel's response to the state's motion was: "I would object to the introduction of the tapes and to playing them again, your Honor, for this reason. Your Honor and I both have heard the entire playing of the tapes. It has consumed some twenty-five minutes, I suspect, or perhaps more, and I would have to concede that the tape and the statement are so

he was denied due process at his trial when, at a critical point, the court proceeded with the trial in his absence. The plaintiff has appealed from the judgment denying the petition.

The court found that, after a trial to the court, the plaintiff was convicted of manslaughter in the first degree and that he was sentenced to a term in the state prison. During the trial proceedings, the state's attorney offered as evidence a written statement, signed by the plaintiff, in which the plaintiff confessed to killing Marsha Layne. The statement was a transcription of a tape recording containing a New Haven police detective's interrogation of the plaintiff. The plaintiff's trial counsel said he would not object to the introduction into evidence of the signed, written statement if he had an opportunity to hear the tape recording. The court recessed and reconvened in chambers where the tapes were played in the presence of the judge, the clerk of the court, the state's attorney, the plaintiff's counsel, two New Haven police detectives and the court reporter.

After the tapes had been played and after the written statement had been checked for its conformity with the tapes, court was reconvened in the courtroom, where the state's attorney moved that the tapes be introduced as full exhibits and that the tapes be played again in the courtroom. The plaintiff's counsel then told the court that the written statement was a satisfactory transcription of the tape recording, but that he would object to introducing and playing the tapes at that point because the tapes had been played once and playing them again would serve no purpose. The public defender also said that he had asked the plaintiff if the plaintiff wanted to be in chambers to hear the tapes, and the plaintiff indicated that he did not.¹ Subsequent-

close that they are basically the same item. There may be a few expletives or pauses that were missed, but to the best of a human's ability, I would have to concede that one follows the other. I don't think they have to be played again for your Honor's benefit because your Honor sat and followed word for word the entire statement in chambers. I have an addi-

ly, the tapes were received into evidence without objection, but they were not played in the courtroom.

The trial court did not, at any time, ask the plaintiff about his absence from chambers or ask the plaintiff whether he wished to be present at the proceedings conducted there. The plaintiff did not personally make any statement on the record regarding his absence from chambers while the tapes were being played.²

The plaintiff now asserts that the proceedings in chambers were a critical part of the trial and that his absence during those proceedings constituted a denial of due process. The state counters with the assertions that, firstly, hearing the tapes in chambers did not constitute a critical stage of the proceedings against the plaintiff, and, secondly, even if it were a critical stage, the plaintiff effectively waived any right he might have had to be present, and, thirdly, even if a right was denied that was not waived, such denial was harmless beyond a reasonable doubt.

[1] The fourteenth amendment guarantees the accused's right to be present during a state trial. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, reh. denied, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80; *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674. The basis for the right, and its extent, however, is the subject of some confusion. See annot., 25 L.Ed.2d 931, 935-37. In *Snyder v. Massachusetts*, supra, the court, in the opinion of the majority of five, said (pp. 105-106, 54 S.Ct. p. 332): "[I]n a prosecution for a felony the defendant has the privilege under the Four-

tional reason. When we recessed to hear these tapes in chambers, I asked the defendant if he wanted to be present for that session and he indicated to me no, he was upset, tired and he would rather not. Your Honor will note that my defense in this case is an insanity defense indicated [sic] a charged-up emotional situation and the defendant has some deep emotional problems. Playing them in the courtroom again would serve no purpose. Your Honor is the judge of the facts and law here. You have heard them once and I don't believe that playing them again would serve any purpose."

teenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." The majority opinion went on to point out that the amendment does not assure the right of presence "when presence would be useless, or the benefit but a shadow"; rather, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Id.*, 106-108, 54 S.Ct. 333. Justice Cardozo, writing for the majority, also distinguished the right of presence from the right of confrontation, the latter being limited to the stages of the trial when there are witnesses to be questioned. *Id.*, 107, 114-15, 54 S.Ct. 330.³ The dissent in *Snyder*, however, found that the sixth amendment guarantees the accused the right of presence at every stage of his trial. *Id.*, 130-32, 54 S.Ct. 330. This formulation of the rule was expressed in dictum in *Diaz v. United States*, 223 U.S. 442, 454, 32 S.Ct. 250, 56 L.Ed. 500, and finds more recent expression and approval in *Illinois v. Allen*, supra, 397 U.S. 338, 90 S.Ct. 1057. This most recent statement came after the application of the sixth amendment to the states through the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923.

[2] The problem, then, is not so much defining the authority for the right as it is establishing to what extent the right of presence attaches when witnesses are not being questioned. The majority in *Snyder* analyzed the proceedings to find those crit-

2. The plaintiff has made assignments of error to correct the finding. They have not been considered because their resolution would have no bearing on the outcome of the appeal.
3. The majority opinion apparently found the source of the right of presence to be in the common law. *Snyder v. Massachusetts*, 291 U.S. 97, 107, 54 S.Ct. 330, 78 L.Ed. 674. Although there are no cases dealing with other stages of the trial, the right of an accused to be present at the rendition of the verdict was recognized early in this state. *State v. Hurlbut*, 1 Root 90.

ical points in the proceedings at which the accused's presence was required to give a full opportunity to defend. The rule suggested by *Illinois v. Allen*, supra, is that the right attaches at "every stage of his trial." From the cases, however, it is clear that not everything associated with the trial of criminal actions is a part of a trial in the constitutional context. See cases in annot., 25 L.Ed.2d 931, and annot., 100 A.L.R. 478; 21 Am.Jur.2d, Criminal Law, §§ 288-308. In the present case, whether the test of either *Snyder v. Massachusetts*, supra, or *Illinois v. Allen*, supra, is chosen, the result is the same. The court's taking of evidence in chambers was a part of the trial, and the plaintiff's presence in chambers would have had a reasonably substantial relation to his opportunity to defend.

The proceedings in chambers were convened to verify the accuracy of a written statement, and the trial judge heard the tape recording for the first time. The purpose of the proceeding was to test the admissibility of one piece of evidence by the introduction of another piece of evidence. At the introduction of the tapes, the plaintiff would have had an opportunity to assist his counsel by explaining the features of the tape recording. He would have had the opportunity to advise his counsel on the accuracy of the tapes and on any defects in the reproduction on the tapes. In the present case, the plaintiff had a right to be present at the evidentiary hearing in chambers.

[3, 4] The court concluded that if the plaintiff had a right to be present at the proceedings conducted in chambers, then he effectively waived that right. The accused's right to be present at trial may be lost by consent, or waiver, or by misconduct. *Snyder v. Massachusetts*, supra, 106; *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174; *Illinois v. Allen*, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 25 L.Ed.2d 353; *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir.), cert. denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219. The plaintiff, relying on *Cross v. United States*, 117 U.S.App.D.C. 56, 325 F.2d 629, 631, claims that, to waive

the right to be present, the accused must be brought personally before the court, advised of the right to be present, and then permitted to make an intelligent and competent waiver. This procedure, however, is not required.

In *Taylor v. United States*, 478 F.2d 689 (1st Cir.), affirmed, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174, the court held that the accused's voluntary absence was an effective waiver of the right to be present. There the accused was free on bail during trial. The court specifically rejected the procedure for waiver required in *Cross*. To the claim that the accused must be told of his rights and the consequences of a waiver before a waiver could be found, as in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747, the court said (p. 692): "[T]hose cases extended the constitutional umbrella so broadly because of other underlying problems. In *Miranda* the court was concerned with the problems of direct coercion, the charged emotional atmosphere in many in-custody interrogations and the understandable fear held by an accused that he had better cooperate with the police if he hopes for any leniency later. In *Brady* the court recognized that a multitude of extraneous factors, some of which might include improper prosecutorial activity, have frequently induced a decision to plead guilty. Thus, in both instances it was thought that the constitutional rights at stake could be meaningfully exercised only if the consequences of waiver were expressly told to the accused. These or similar underlying fears are simply absent in our case." It concluded that the constitutional right to be present during the trial was one which could be effectively waived by voluntary absence. Although *Taylor* dealt with a situation where the accused was free on bail, and *Cross* dealt with a situation where the accused was in custody, as in the present case, the rationale of *Taylor* would support a finding of waiver, short of the procedure in *Cross*, in cases, such as the present, where the accused is in custody and where

he is temporarily absent during the trial. In the present case, there is no assertion of coercion, no suggestion that the plaintiff would get better treatment if he absented himself from chambers, and no claim that he did not have the assistance of counsel to make intelligent trial decisions. Further, there is no indication that there was a communication problem between counsel and the plaintiff. In the final analysis, whether there has been an intelligent and competent waiver of the right to presence "must depend, in each case, upon the particular facts and circumstances surrounding that case." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461.

[5-7] Waiver is the intentional relinquishment of a known right. "Waiver does not have to be express, but 'may consist of acts or conduct from which waiver may be implied.'" *Novella v. Hartford Accident & Indemnity Co.*, 163 Conn. 552, 562, 316 A.2d 394, 400. The plaintiff was specifically asked whether he wanted to be present in chambers when the tapes were played. Although defense counsel's inquiry was not framed in terms of a constitutional right, it still contained the essence of the right: he had the opportunity to attend. The plaintiff never personally stated his answer for the record, but his counsel gave the purported answer in his presence. It is clear that the plaintiff should have known what was going to happen in chambers. Counsel's statement also indicates that, knowing he could attend, the plaintiff intentionally chose not to. The findings of the court support its conclusion that there was a waiver of the right to be present.⁴

There is no error.

In this opinion the other judges concurred.

4. We also note that although the state's attorney moved that the tapes be played again, they were not played because the defense counsel objected. The defense voluntarily relinquished the opportunity to test the evidence in the plaintiff's presence. As stated in *Estelle v. Williams*, 425 U.S. 501, 512, 96 S.Ct. 1691, 1697, 48 L.Ed.2d 126: "Under our adversary

STATE of Connecticut

v.
Mark Carvin OLDS.

Supreme Court of Connecticut.

Aug. 10, 1976.

Defendant was convicted before the Superior Court, New Haven County, Naruk, J., of second-degree robbery, unlawful restraint in second degree and third degree assault, and he appealed. The Supreme Court, Barber, J., held that neither denial of mistrial on basis of State's failure to produce victim's girl friend's statement nor denial of continuance to enable girl friend to be returned to State for purpose of testifying was an abuse of discretion, that giving of certain instruction in regard to whether adverse inference could be drawn from failure of State to call girl friend as witness was not error, that defendant was not entitled to have information dismissed due to fact that he was held in correctional center in excess of 45 days without being presented in court in violation of statute pertaining to detention of persons who have not made bail, that refusal to permit defendant to be present during argument on pretrial motions to quash and to reduce bond and pretrial motions for production and for trial by jury of 12 was proper, that evidence, in regard to defendant's claim that his attorney's privileged communications relating to trial strategy were opened outside defendant's presence at correctional center, was insufficient to warrant dismissal of information, that jury selection statutes are constitutionally valid and that statute, which provides for a jury of six in all

system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system."

STATE OF CONNECTICUT

DOCKET NO. 18532

STATE

:

SUPERIOR COURT

VS.

:

NEW HAVEN COUNTY

NAPIER DUPRAY TALTON

:

APRIL 24, 25, 26, 27,
1973.

B E F O R E:

HON. LOUIS GEORGE, Judge.

TRIAL TRANSCRIPT

APPEARANCES:

ARNOLD MARKLE, ESQ.
State's Attorney

ANTHONY V. DeMAYO, ESQ.
Public Defender

Walter Rochow
Court Reporter

D E T E C T I V E P A U L M C C O R M I C K ,

of the New Haven Police Department, called as a witness
in behalf of the State, having been duly sworn, testified
as follows:

DIRECT EXAMINATION

BY MR. MARKLE:

Q Detective McCormick, were you on duty on February 23,
1972?

A Yes.

Q And at that time, did you have occasion on that
morning to go to 191 Edgewood Avenue?

A Yes.

Q What, if anything, did you observe when you went
there?

A I observed the body of a white female laying in the
snow face down, in the rear yard of 191 Edgewood Avenue.

Q I show you these photographs, State's Exhibit F,
State's Exhibit E, State's Exhibits D, C and B, and ask you
if that is a true and accurate portrayal of the scene as
observed by you when you arrived?

A Yes, sir.

Q Were you also there in the morning hours when the
Medical Examiner arrived and the body was turned over?

A No, I was not.

Q And, at that time, did you have occasion to do

anything at the crime scene?

A Yes, sir.

Q What, if anything, did you do?

A I began a neighborhood check to determine if anyone had witnessed or heard anything concerning this girl, and also I made a search for what we believed to be a murder weapon, and I also discovered a bloodstained trail leading approximately one block north on Kensington Street, from Elm to Edgewood, where the deceased was found.

Q Did you continue to do anything at that time?
Did you find anything further?

A I found a knife, a makeshift knife, which was believed to be the murder weapon.

Q With the Court's permission, can you diagram where you went and where you found the location of the body?

A I believe I can.

Q Detective McCormick, would you diagram the location of the body and where you found any items as a result of your scene search?

(Witness at blackboard.)

A This is the best of my drawing. I would have to explain it.

Q Would you explain to the Court and Mr. DeMayo what --
You have indicated a house?

A This is a garage here. This is a house here at

191 Edgewood. This is Kensington Street. This is Elm Street. This is the rear yard of 191 Edgewood Avenue, where the deceased was found. There is a fence that separates this, and this is the garage, and this separates the rear of the properties of 191 from the rear yard of Kensington Street. I believe this is -- I believe this house is 84 and this house is 76. This object here was a wig, a female wig, and over here in the alleyway was a makeshift knife that was believed to be the murder weapon.

Q Did you take that into your possession?

A I stood by the weapon, had the Bureau of Identification come immediately there, he photographed the weapon, and then he took the weapon as evidence.

Q I show you this item, and ask you if that is the same weapon that you saw and observed in that location and turned over to the evidence personnel?

A Yes, sir.

MR. MARKLE: I offer it.

MR. DeMAYO: I have no objection.

THE COURT: It may be marked as State's Exhibit

G.

(A makeshift knife was received and marked State's Exhibit G in evidence.)

(The witness resumed his seat.)

BY MR. MARKLE:

Q Referring to the diagram, Detective McCormick, you found the knife between these two locations, is that correct?

A Yes, sir.

Q I have reference to the two houses that you designated on Kensington.

A Yes.

Q They fronted on Kensington?

A Yes.

Q And the wig was to the rear of one of the houses?

A That is correct.

Q And the trail of blood that you found led from where to where?

A The trail of blood -- can I come back to the board?

Q Yes. We want to get it straight for the record.

(Witness stood at blackboard.)

A The trail of blood ends approximately here, at the rear yard of Kensington. First discovered here, this is 532 Elm. It was discovered in the rear yard here, it led out, comes out onto the sidewalk portion. There is a house here and there is a fence that runs into the rear of this property and the bloodstains came to here, and then they come over a fence into another yard and continue and they end approximately right around in behind this garage, and then from where that

bloodstained trail ends to where the girl was found, I would say was a good hundred feet.

Q So, then, is it fair to say that these dotted lines are the bloodstains?

A Yes, sir.

Q And that refers to here also?

A Yes, all those dots.

Q Is that correct?

A Yes.

Q The wig was found here, right?

A Yes, sir.

Q And the knife was found here?

A Yes, sir.

Q You can resume the stand.

(The witness resumed his seat.)

Q I show you this photograph, and ask you whether or not this is a true and accurate portrayal of where the wig was found?

A Yes, sir.

Q That is at the rear of the houses that front on Kensington, you found it at the rear of those?

A Yes.

MR. MARKLE: I would offer this photograph.

BY MR. DeMAYO:

Q This photograph that has been offered showing the

wig represents the wig as you saw it on the ground that morning?

A Yes, sir.

MR. DeMAYO: All right. I have no objection to that.

THE COURT: It may be marked State's Exhibit H.

(A photograph was received and marked State's Exhibit H in evidence.)

BY MR. MARKLE:

Q Showing you a photograph, is this a true and accurate portrayal of where you found State's Exhibit G on that morning?

A Yes, sir.

Q That is between the two houses on Kensington Street?

A Yes, sir.

MR. DeMAYO: I have no objection to it.

THE COURT: State's Exhibit I.

(A photograph was received and marked State's Exhibit I in evidence.)

BY MR. MARKLE:

Q Detective McCormick, did you have occasion to talk to the accused thereafter?

A Yes, sir.

Q And what date was that?

A It was on February 24, 1972.

Q Where was that?

A At the Detective Division of the New Haven Police Department.

Q At that time, was he in custody?

A Yes, sir, he was under arrest.

Q Whether or not, at that time and at that place, you gave him any warnings?

A Yes, sir, I warned him of his Miranda rights, which is mimeographed on a New Haven Police Department rights form.

Q Did he sign those and were they read to him?

A Yes, sir, I read them to him, and he signed three waivers.

Q I show you this first waiver, and ask you whether or not that is what he signed at that time and at that place?

A Yes, sir.

Q And your signature appears thereon and so does that of the accused, together with his initials next to each one, is that correct?

A That is correct.

MR. DeMAYO: Are you offering this?

MR. MARKLE: Yes, I am.

MR. DeMAYO: May I inquire?

THE COURT: Surely.

BY MR. DeMAYO:

Q Detective McCormick, at what time on February 24th,

if you recall, was this done, this waiver completed?

A 5:00 P. M.

Q 5:00 P. M. For how long had the accused, if you know, been at the Police Department or Detective Bureau, whichever the case may be?

A Actually, I don't know.

Q How long had he been in your presence?

A Approximately 15 minutes while I advised him of his rights.

Q That was your only function, to advise him of his rights?

A Advise him of his rights, and I then took a statement from him.

Q You took a statement which followed the waiver?

A The statement was approximately 10 to 15 minutes later.

Q After the waiver?

A Yes, sir.

Q At the time that you prepared the waiver, you observed the defendant for a few moments and you talked to him about the material in here?

A The defendant was sitting with me, yes.

Q Did he appear to be under the influence of any drug or intoxicating liquor at any time?

A No, he did not.

Q Did he appear to be, based on your powers of observation, did he appear to be in full control of his senses?

A Yes, I would say he was.

Q By that, sir, I mean he didn't appear to be disabled in any way, incoherent, intoxicated, in any way under the influence of anything that you could tell?

A No, he appeared normal to me.

MR. DeMAYO: I have nothing further. Thank you.

All right.

THE COURT: It may be marked State's Exhibit J.

(A waiver form of the New Haven Police Department was received and marked State's Exhibit J in evidence.)

BY MR. MARKLE:

Q Was a confession taken from the defendant; did he give you a statement?

A Yes, sir.

Q Was that statement typed up, and did he sign that statement?

A Yes, sir.

Q Did he initial corrections in that statement?

A Yes.

Q Is this the statement that you took, and which was signed and initialed in the corrected areas by Mr. Talton at that time?

A Yes, sir, this is the original statement.

Q Signed by him and initialed by him?

A Yes, sir.

Q Was it read to him?

A Yes, it was.

Q And did he sign it, stating it was a free and voluntary statement?

A Yes, sir.

MR. MARKLE: I would offer it.

MR. DEMAYO: May I inquire again?

THE COURT: Yes, you may.

BY MR. DEMAYO:

Q Detective McCormick, this statement or series of pages which really are typewritten questions and answers, is it your testimony that this represents the questions and answers that you put to Mr. Talton and his answers to you?

A Yes, that is correct.

Q Were these typed subsequently by someone else or was this being typed while the interrogation proceeded?

A No, that was taped as I asked him the questions, and he answered me in his own voice. Upon completion of the statement, the taping of the statement, the females that type our statements typed it up under the instruction that the tapes were to be saved. They were turned over to us, put into an evidence envelope, put into a safe, to be preserved

for court.

Q So you conducted this evidence interview, had this recorded by an electronic device of some sort, and then someone prepared this typing from the tape?

A Yes, sir.

Q Did you compare the tape with the statement yourself?

A No, I didn't compare it word-for-word, but as I read it, it appeared to be --

Q It sounded to you like the conversation you had with Mr. Talton?

A Yes.

MR. DeMAYO: I would have no objection to the introduction of it, your Honor, provided I be given an opportunity to hear the tape before the conclusion of the trial.

THE COURT: You would be entitled to hear it at a later period.

It may be admitted in evidence.

MR. MARKLE: I sent for the tape recorder. It is a unique type of tape. It is on the way over here.

MR. DeMAYO: Otherwise, your Honor, I have no objection to it.

THE COURT: The statement itself will be marked State's Exhibit K.

If you would like to hear it in chambers at a later period, to see if there is any inconsistency, fine, but I will admit this transcript in evidence now.

(Transcript of tape-recorded statement was received and marked State's Exhibit K in evidence.)

MR. MARKLE: I hope the type recorder is here.

What I would like to do is have Mr. DeMayo, yourself and myself hear that tape.

THE COURT: The moment it comes in, we will take a recess.

MR. MARKLE: It just came right now.

THE COURT: Then we will hear it right now.

Recess, Mr. Sheriff.

(Whereupon, the court stood in recess.)

(The following occurred in Judge George's chambers:)

THE COURT: All right, gentlemen.

MR. MARKLE: We are in chambers, and with the Court's permission, I am about to make a statement.

There are two tapes here. We haven't had a chance to listen to them, and it is a tape recording of the conversation, the questioning by Detective McCormick of Napier Dupray Talton, and we are about

to play it for the Judge, with the Clerk and court reporter present, with Mr. DeMayo present, the Judge and Detective McCormick present, myself, and Detective Yakamoff.

(At this juncture, a tape-recorded statement was played.)

THE COURT: All right, gentlemen. We will go back out.

(The court resumed its session in the courtroom as follows:)

THE COURT: All right, gentlemen.

MR. MARKLE: If your Honor please, his Honor has marked as a full exhibit the transcript of the tape recording which we just heard, State's Exhibit K, and so that the record is complete, I would move that the two tapes of the tape recording of this conversation which have now been heard by defense counsel, myself and your Honor, in the presence of Detective McCormick, and that was in chambers, be introduced into evidence as full exhibits, and the tapes played again, so that your Honor can hear the full import of what has been said. I think there is no question but the two voices on the tape were that of Detective McCormick and the defendant, who sits here.

BY MR. MARKLE:

Q Is that true?

A Yes.

Q And that is a true and accurate portrayal of the statement that has been taken?

A Yes.

MR. DeMAYO: I would object to the introduction of the tapes and to playing them again, your Honor, for this reason. Your Honor and I both have heard the entire playing of the tapes. It has consumed some 25 minutes, I suspect, or perhaps more, and I would have to concede that the tape and the statement are so close that they are basically the same item. There may be a few expletives or pauses that were missed, but to the best of a human's ability, I would have to concede that one follows the other. I don't think they have to be played again for your Honor's benefit because your Honor sat and followed word for word the entire statement in chambers.

I have an additional reason. When we recessed to hear these tapes in chambers, I asked the defendant if he wanted to be present for that session and he indicated to me no, he was upset, tired, and he would rather not.

Your Honor will note that my defense in this case is an insanity defense, indicating a charged-up emotional situation, and the defendant has some deep emotional problems. Playing them in the courtroom again would serve no purpose. Your Honor is the judge of the facts and the law here. You have heard them once and I don't believe that playing them again would serve any purpose.

THE COURT: Do you want to be heard any further?

MR. MARKLE: Well, I believe they should be marked as full exhibits so that there is no question, and your Honor heard them --

THE COURT: Yes, I have heard them.

Do you object to marking them as a full exhibit, the tapes?

MR. DeMAYO: No, I don't.

THE COURT: Do you object?

MR. MARKLE: No.

THE COURT: They may be marked as a full exhibit, the two tapes.

(Two tape cassettes were received and marked State's Exhibit L in evidence.)

THE COURT: It may be noted for the record that the voices of Detective McCormick and the defendant

are conceded.

MR. DeMAYO: Yes.

MR. MARKLE: Then, for the record, your Honor, so that the record is clear, I would ask permission to read this into the record, the statement.

THE COURT: You may do so.

You mean Exhibit K?

MR. MARKLE: Yes, and the face sheet, which is Exhibit J.

THE COURT: Go ahead.

MR. MARKLE: I will now read Exhibit J into the record.

"Department of Police Service, New Haven, Connecticut. File: 13872.

"WARNING.

"You have the right to remain silent. If you talk to any police officer, anything you say can and will be used against you in a court of law. You have the right to consult with a lawyer before you are questioned, and may have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you, if you wish, before any questioning. If you wish to answer questions you have the right to stop answering at any time. You may stop answering questions at any time if you wish

to talk to a lawyer, and may have him with you during any further questioning.

"WAIVER.

"I have been advised that:

"I have the right to remain silent.

"If I talk to any police officer, anything I say can and will be used against me in a court of law.

"I have the right to consult with a lawyer before I answer any questions and I may have a lawyer with me during any questioning.

"I have the right to have a lawyer appointed for me, if I cannot afford one, before I answer any questions.

"I know that if I answer questions, I have the right to stop answering at any time.

"I may stop answering questions at any time if I wish to talk to a lawyer, and have him with me during any further questioning.

"I am willing to answer questions and make this statement knowing that I have and fully understand these rights. I do not want a lawyer at this time. I do make the following statement(s) without fear, threats or promise of favor, knowing that this statement can be used for or against me in a court of

law.

"DATED AT New Haven on the 24 day of Feb. 1972,
5:P.M.

"SIGNED Napier Talton. WITNESSED: Det. Paul
McCormick.

"SWORN AND SUBSCRIBED TO BEFORE ME THIS 24th
DAY OF Feb. 1972."

BY MR. MARKLE:

Q I can't read this bottom name. Is that Detective
Sergeant Berg?

THE WITNESS: No, Howard Bierdon.

MR. MARKLE: For the record, so that there is
no question on it, on State's Exhibit J, the
defendant initialed this and he also signed it.

THE COURT: All right.

MR. MARKLE: State's Exhibit K reads as follows:--

MR. DeMAYO: Do you intend to read that whole
statement into the record?

MR. MARKLE: Yes, I do.

MR. DeMAYO: Your Honor, if it is an exhibit,
why is it necessary to read the whole thing?

MR. MARKLE: If it is conceded it is a free and
voluntary statement, then it is all right.

MR. DeMAYO: I asked some questions as to its
voluntariness, and I just said to your Honor that I

would have no objection, subject to my exploring a couple of things with Detective McCormick, and I listened to the tapes and I have heard the tapes, and I have made no further motion that they be stricken or the exhibit be stricken.

MR. MARKLE: Then, your Honor, I have no further questions of this witness.

THE COURT: Then you may proceed with your cross-examination.

CROSS-EXAMINATION

BY MR. DeMAYO:

Q In the course of the statement, it was indicated at some point by the defendant to you that he had been cut himself in the course of this tussle with the victim, do you recall that?

A Yes.

Q Did you examine the wounds or the cuts on his hand?

A Yes.

Q Can you describe them for us, or can you recall the situation well enough to describe them to us?

THE COURT: You may refer to your notes, if you wish.

MR. DeMAYO: It is in the statement, I think, that long paragraph near the end.

A Yes. He showed me a cut on his left hand, on the

wrist, on the palm, and this cut is approximately 2 inches long, and he showed me marks on his skin of his index and ring finger on the inside of his right hand.

Q Did the cuts he showed you appear to be recent, at that time, recent vintage, recently inflicted?

A Yes, they did.

Q I show you a color photograph, and ask you if that is one of the cuts that you are referring to?

A Yes.

Q That is the cut on the left upper palm?

A Yes.

MR. DeMAYO: I will offer that.

MR. MARKLE: I have no objection to it.

THE COURT: Defendant's Exhibit One.

(A photograph was received and marked
Defendant's Exhibit One in evidence.)

BY MR. DeMAYO:

Q There is another photograph here. I am not sure what this photograph is supposed depict. If you can't help us, I will discard it. If it is significant, I would like an explanation. It is a picture of the side view of the accused. Does that picture mean anything?

A No.

Q Can you pick out from these pictures which one shows the injury that you described to us the best?

A The other ones, in my opinion, were very superficial, such as scratches.

THE COURT: I think he indicated marks on the skin of the ring and index finger of the right hand.

MR. DeMAYO: I would offer this.

BY MR. DeMAYO:

Q Is this picture a depiction of what you saw?

A Yes.

MR. DeMAYO: Is there any objection to this one?

MR. MARKLE: No.

THE COURT: Defendant's Exhibit Two.

(A photograph was received and marked Defendant's Exhibit Two in evidence.)

BY MR. DeMAYO:

Q When the statement-taking process was concluded, Detective McCormick, what happened next in the course of your handling of this matter?

A The tape was removed -- there were two tapes. They were given to the female stenographer, whose initials are --

Q I'm sorry, I must have confused you.

After the statement was taken, transcribed and signed, what happened next?

A I was finished with my involvement with the defendant, and I believe he was incarcerated in our detention cell in the Detective Division, which is a wire screen area,

and what happened to him from there --

Q You did nothing further on that occasion, as far as this case is concerned?

A No, sir.

Q I am not arguing with you, but did you see on that occasion any other persons connected with this case?

MR. MARKLE: I will object to that, if the Court please. It is outside the scope and irrelevant. I just put him on for the limited purpose of what he did.

THE COURT: What is the purpose of your question, Mr. DeMayo, or was it just a fishing expedition, actually?

MR. DeMAYO: I just want to be sure that I have a complete picture of what went on at Detective Headquarters.

THE COURT: Is there anything else you did after that, either yourself or with any other officer?

THE WITNESS: Not directly with the defendant, no.

MR. DeMAYO: I have no further questions.

MR. MARKLE: I have no further questions.

THE COURT: You may step down.

(The witness was excused.)